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90-172

No.

Supreme Court, U.S.
FILED
JUL 25 1990
[redacted]PANIOL, JR.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

JACK ROBINETTE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the rebuttal provisions of a Department of Labor regulation satisfy Section 402(f)(2) of the Black Lung Benefits Act, which requires the Department to apply "[c]riteria * * * not more restrictive" than the criteria applied during an earlier phase of the black lung program.

2. Whether the statute, if construed to invalidate the Department's rebuttal provisions, violates the constitutional guarantee of due process.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional, statutory and regulatory provisions involved	2, 25a
Statement	2
Reasons for granting the petition	5
Conclusion	5
Appendix A	1a
Appendix B	8a
Appendix C	13a
Appendix D	16a
Appendix E	25a

TABLE OF AUTHORITIES

Cases:

Bethenergy Mines, Inc. v. *Director, OWCP*, 890 F.2d 1295 (3d Cir. 1989), petition for cert. filed *sub nom. Pauley* v. *Bethenergy Mines, Inc.*, No. 98-1714	5, 6
Dayton v. *Consolidation Coal Co.*, 895 F.2d 173 (4th Cir. 1990), petition for cert. pending, No. 90-114	4, 6
Pittston Coal Group v. *Sebben*, 109 S. Ct. 414 (1988)	2
Taylor v. *Clinchfield Coal Co.*, 895 F.2d 178 (4th Cir. 1990), petition for cert. pending, No. 90-113	4, 6
Taylor v. *Peabody Coal*, 892 F.2d 503 (7th Cir. 1989), petition for cert. pending, No. 89-1696	6
Youghiogheny & Ohio Coal Co. v. *Milliken*, 866 F.2d 195 (6th Cir. 1989)	5

Constitution, statutes and regulations:

U.S. Const. Amend. V	2, 25a
Black Lung Benefits Act, 30 U.S.C. 901 *et seq.*	2
§ 402(f), 30 U.S.C. 902(f)	2, 25a
§ 402(f)(2), 30 U.S.C. 902(f)(2)	2, 3, 4, 6

Constitution, statutes and regulations—Continued: Page

30 U.S.C. 945(a) 3
30 U.S.C. 945(a) (3) (A) 3
20 C.F.R.:
Section 410.490 2
Section 410.490(b) (1) 3
Section 410.490(c) (1) 3
Section 410.490(c) (2) 3
Section 727.203 2
Section 727.203(a) (1)-(5) 3
Section 727.203(b) (1) 3
Section 727.203(b) (2) 3
Section 727.203(b) (3) 3
Section 727.203(b) (4) 4

In the Supreme Court of the United States

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No.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

JACK ROBINETTE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the Director, Office of Workers' Compensation Programs, United States Department of Labor, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-7a) is unpublished, but the decision is noted at 902 F.2d 1566 (Table). The decision and order of the Benefits Review Board (App., *infra*, 8a-12a), the Board's order on reconsideration (App., *infra*, 13a-15a), and the decision and order of the administrative law judge (ALJ) (App., *infra*, 16a-24a) are also unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 27, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution; Section 402(f) of the Black Lung Benefits Act, 30 U.S.C. 902(f); the Department of Health, Education and Welfare's presumption regulation, 20 C.F.R. 410.490; and the Department of Labor's presumption regulation, 20 C.F.R. 727.203, are reprinted in the appendix to this brief. App., *infra*, 25a-32a.

STATEMENT

1. The Black Lung Benefits Act, 30 U.S.C. 901 *et seq.*, provides benefits to former coal miners and their survivors for total disability or death due to pneumoconiosis. Disability claims filed by June 30, 1973, were considered by the Department of Health, Education, and Welfare (HEW) under regulations that included a presumption of entitlement to benefits (20 C.F.R. 410.490) that was available to certain claimants. Claims filed after that date are considered by the Department of Labor. Claims filed with the Department of Labor before April 1, 1980, are subject to Section 402(f)(2) of the statute, 30 U.S.C. 902(f)(2), which provides that the "[c]riteria" applied to those claims "shall not be more restrictive than the criteria applicable to a claim" adjudicated by HEW. See *Pittston Coal Group* v. *Sebben*, 109 S. Ct. 414, 417-419 (1988).

In response to Section 402(f)(2), Labor promulgated its own presumption regulation, 20 C.F.R. 727.203. While there were only two ways to invoke

HEW's presumption (see 20 C.F.R. 410.490(b)(1)), there are five ways to invoke Labor's presumption. See 20 C.F.R. 727.203(a)(1)-(5). Once the presumption had been invoked, HEW's regulation specified that the presumption could be rebutted (1) by proving that the miner was doing his usual coal mine work or comparable work or (2) by proving that the miner was capable of doing such work. 20 C.F.R. 410.490(c)(1) and (2). In contrast, Labor's regulation specifies four rebuttal methods. The first two generally correspond to the two specified HEW methods. 20 C.F.R. 727.203(b)(1) and (2). The third and fourth Labor methods allow a party contesting entitlement to defeat a claim either (3) by proving that the disability or death of the miner did not arise in whole or in part from coal mine employment or (4) by proving that the miner does not or did not have pneumoconiosis. 20 C.F.R. 727.203(b)(3) and (4).

2. In 1973, Jack Robinette applied to HEW for black lung benefits. After HEW denied his claim, he elected and received review of the claim in light of the 1978 amendments to the Black Lung Benefits Act.[1] HEW again denied his claim, but referred it to the Department of Labor for further review. App., *infra*, 2a. This claim, which is properly treated as if it had been filed with the Department of Labor, 30 U.S.C. 945(a)(3)(A), is subject to the prohibition in Section 402(f)(2) against the application of criteria that are more restrictive than those that HEW applied.

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[1] The procedures by which claimants could elect review of claims that had been denied before the effective date of the 1978 amendments are set forth in 30 U.S.C. 945.

The Department of Labor denied benefits. The ALJ found it undisputed that the claimant had presented x-ray evidence showing pneumoconiosis arising from his work as a miner, and therefore concluded that he had invoked the presumption of eligibility. App., *infra*, 17a-19a. The ALJ also found, however, that the medical evidence established that the claimant's pneumoconiosis was not totally disabling. *Id.* at 21a. In the ALJ's view, that evidence satisfied Labor's second rebuttal method (proof that the claimant was able to do his usual coal mine work) but not its third method (proof that the miner's disability did not arise in whole or in part from his work as a miner). *Id.* at 21a-23a.

The Benefits Review Board held that the ALJ had erred in finding rebuttal under Labor's second method. App., *infra*, 10a. Under controlling court of appeals decisions issued after the ALJ's decision, the second rebuttal method is unavailable where the miner's pulmonary or respiratory condition is not disabling, but the miner has a non-respiratory disability. *Ibid.* The Board nevertheless found the evidence sufficient to rebut the presumption under Labor's third method, and concluded that the ALJ's error in relying on the second rather than the third method was "harmless." *Id.* at 11a.

3. The court of appeals reversed the denial of benefits. App., *infra*, 1a-7a. Relying on its previous decisions in *Taylor* v. *Clinchfield Coal Co.*, 895 F.2d 178 (4th Cir. 1990), petition for cert. pending, No. 90-113 (filed July 17, 1990), and *Dayton* v. *Consolidation Coal Co.*, 895 F.2d 173 (4th Cir. 1990), petition for cert. pending, No. 90-114 (filed July 17, 1990), the court held that Labor's third and fourth rebuttal methods violated Section 402(f)(2)'s prohibition against the use of more restrictive criteria.

App., *infra*, 6a. In the court's view, rebuttal may be accomplished only by proof that a miner was working or was able to work (Labor's first and second methods) and not by proof that a miner's disability did not arise in whole or in part from coal mining (Labor's third method) or by proof that the miner did not have pneumoconiosis (Labor's fourth method). *Ibid.* Because the evidence did not show that the claimant was working or was able to work, the court concluded that rebuttal was unavailable under HEW's regulation and that benefits should be awarded. *Id.* at 7a.

REASONS FOR GRANTING THE PETITION

The questions presented in this case are identical to the questions presented in *Pauley* v. *Bethenergy Mines, Inc.*, No. 89-1714, *Clinchfield Coal Co.* v. *Director*, No. 90-113, and *Consolidation Coal Co.* v. *Director*, No. 90-114, which also involve the validity of the rebuttal provisions in the Department of Labor's presumption regulation. As discussed in more detail in our brief in *Pauley*,[2] review of the questions presented is warranted because the courts of appeals are divided on the validity of the rebuttal provisions. The Third and Sixth Circuits have upheld the provisions. See *Bethenergy Mines, Inc.* v. *Director, OWCP*, 890 F.2d 1295 (3d Cir. 1989), petition for cert. pending *sub nom. Pauley* v. *Bethenergy Mines Inc.*, No. 89-1714 (filed May 7, 1990); *Youghiogheny & Ohio Coal Co.* v. *Milliken*, 866 F.2d 195 (6th Cir. 1989). The court below and the Seventh Circuit have invalidated parts of the regulation.

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[2] We are serving a copy of our brief in *Pauley* on counsel for respondent, the only other party in this case.

See App., *infra*, 6a; *Taylor* v. *Peabody Coal Co.*, 892 F.2d 503 (7th Cir. 1989), petition for cert. pending, No. 89-1696 (filed May 2, 1990). Accord *Taylor* v. *Clinchfield Coal Co.*, 895 F.2d at 182-183; *Dayton* v. *Consolidation Coal Co.*, *supra*. The courts of appeals have acknowledged the conflict. See *Peabody Coal*, 892 F.2d at 506; *Pauley*, 890 F.2d at 1302-1303. Indeed, the court below stated: "We recognize this conflict among the circuits and hope either that Congress will act to clarify these confusing regulations or that the Supreme Court will definitively resolve this conflict." App., *infra*, 6a n.8.

The conflict can be expected to have a significant, detrimental impact on the administration of the black lung program because an estimated 2,000 to 3,500 claims governed by Section 402(f)(2), each valued at between $118,315 and $185,656, are still in litigation, and we believe that a high percentage of them are affected by the conflict. See Fed. Resp. Br. at 8-9 in *Pauley* v. *Bethenergy Mines, Inc.*, No. 89-1714. However, we do not think that this is an appropriate vehicle for plenary review, and we recommend instead that the Court hold this petition and then dispose of it in light of its disposition of the other pending cases. That course is preferable because no coal mine operator is involved in this case. Since the coal companies will be required to pay benefits in many additional cases if Labor's third and fourth rebuttal methods are held to be invalid, we believe that the validity of those methods ought to be resolved in a case in which a coal company is a party. In addition, the unpublished, per curiam decision in this case does not analyze the questions presented in a way that would assist the Court in resolving them.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of as appropriate in light of the disposition of the petition in No. 89-1714, *Pauley* v. *Bethenergy Mines Corp.*, or No. 90-114, *Consolidation Coal Co.* v. *Dayton*.[3]

Respectfully submitted.

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JULY 1990

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[3] In our responses to the certiorari petitions in these two cases, we set forth more fully our reasons for believing that, of the cases in which certiorari petitions have been filed, they are the strongest candidates for plenary consideration.

See App., *infra*, 6a; *Taylor* v. *Peabody Coal Co.*, 892 F.2d 503 (7th Cir. 1989), petition for cert. pending, No. 89-1696 (filed May 2, 1990). Accord *Taylor* v. *Clinchfield Coal Co.*, 895 F.2d at 182-183; *Dayton* v. *Consolidation Coal Co.*, *supra*. The courts of appeals have acknowledged the conflict. See *Peabody Coal*, 892 F.2d at 506; *Pauley*, 890 F.2d at 1302-1303. Indeed, the court below stated: "We recognize this conflict among the circuits and hope either that Congress will act to clarify these confusing regulations or that the Supreme Court will definitively resolve this conflict." App., *infra*, 6a n.8.

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JULY 1990

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 88-1144

JACK ROBINETTE, PETITIONER

versus

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, RESPONDENT

On Petition for Review of an Order of the Benefits Review Board

(No. 86-215-BLA)

Argued: January 8, 1990 Decided: April 27, 1990

Before ERVIN, Chief Judge, MURNAGHAN, Circuit Judge, and MOTZ, United States District Judge for the District of Maryland, sitting by designation.

PER CURIAM:

In this case, Jack Robinette seeks review of the decision of the Benefits Review Board ("BRB" or "Board") affirming the denial of benefits under the Black Lung Benefits Act, 30 U.S.C. §§ 901 *et seq.* Specifically, Robinette contends that the Board erred

in finding that the Director, Office of Workers' Compensation Programs [1] ("Director") had rebutted the presumption of total [dis]ability by proving that the disability did not arise out of his coal mining employment. He also claims that the Board erred in not remanding the case back to the Administrative Law Judge for reconsideration under the less restrictive criteria of 20 C.F.R. § 410.490. In light of this court's decision in *Taylor v. Clinchfield Coal Co.*, —— F.2d ——, No. 87-3852 (4th Cir. 1990), we reverse and remand the Board's decision with instructions to award benefits under the interim Health, Education and Welfare regulations found in 20 C.F.R. Part 410.

I.

On March 23, 1973, Jack Robinette filed an application with the Social Security Administration for disability income benefits under Part B of the Black Lung Benefits Act. In 1978, he filed an election to have his claim reviewed by the Social Security Administration ("SSA"). After the claim was denied by the SSA, it was reviewed by the Department of Labor under Part C of the Black Lung Benefits Reform Act. The Department also administratively denied the claim, and Robinette requested a formal hearing.

A hearing was held before Administrative Law Judge James J. Butler ("ALJ") on July 10, 1985. At that hearing, the Director stipulated that Robinette had worked 30 years in coal mine employment,

[1] The Deputy Commissioner in the Office of Workers' Compensation Programs dismissed the coal mine operator and transferred potential liability to the Black Lung Disability Trust Fund pursuant to the 1981 Amendments to the Black Lung Benefits Act.

had pneumoconiosis, and that pneumoconiosis was a causal factor in his disability. The only issue contested by the Director was whether Robinette was totally disabled as defined by the Act. On December 24, 1985, the ALJ issued an order denying benefits. The order stated that Robinette was entitled to the interim presumption pursuant to 20 C.F.R. § 727.203 (a)(1) that he was totally disabled because of pneumoconiosis arising out of his coal mine employment. However, the ALJ also concluded that this presumption had been rebutted pursuant to 20 C.F.R. § 727.203(b)(2) ("(b)(2) rebuttal") because the preponderance of the evidence established that Robinette was not totally disabled because of pneumoconiosis. Robinette appealed the decision to the Board.

In its decision, the BRB reversed the ALJ's finding that the (b)(2) rebuttal was established, but it also reversed, *sua sponte*, the ALJ's conclusion that the 20 C.F.R. § 727.203(b)(3) rebuttal ("(b)(3) rebuttal") was not established.[2] It found that the ALJ's rebuttal findings under subsection (b)(2) were affirmable under subsection (b)(3) because of the intervening pronouncement in *Sykes v. Director, OWCP*, 812 F.2d 890 (4th Cir. 1987).[3] Holding that

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[2] Rebuttal under (b)(3) is recognized when the evidence establishes that the miner's disability did not arise out of the coal mining employment.

[3] In *Sykes*, this court stated:

> Section 727.203(b)(2) is concerned with the question of whether miners are totally disabled *for whatever reason*. There is no inquiry into causation in a proper § 727.203 (b)(2) rebuttal. . . . Causation is addressed in § 727.203 (b)(3). Once the miner's disability is conceded, *then*

the presumption had been rebutted under (b)(3), the Board denied any benefits to Robinette under 20 C.F.R. Part 727, but remanded the case to the ALJ for consideration of entitlement under 20 C.F.R. § 410.490.

The Director filed a Motion for Reconsideration of the remand, and on June 23, 1988, the Board issued an Order on Reconsideration affirming the ALJ's denial of benefits. In its decision, the Board held that section 410.490 was inapplicable to Robinette's claim because, as applied, the section violated the Administrative Procedure Act.[4] It, therefore, granted the Director's Motion for Reconsideration and affirmed the ALJ's denial of benefits.

Robinette then appealed these decisions to this Court.

II.

The Black Lung Benefits Act provides benefits to former coal mine employees who are totally disabled

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> the question arises whether the disability is unrelated to mine work.

Sykes, 812 F.2d at 894. Before our opinion in *Sykes*, the BRB had taken the position that an employer may rebut the interim presumption under section [727.]203(b)(2) by showing that a miner, while concededly totally disabled, is not disabled for pulmonary or respiratory reasons. This apparently had also been the position of the Director's counsel and the ALJ in the present case.

[4] The BRB relied on its own decision in *Whiteman v. Boyle Land and Fuel Coal Co.*, BRB No. 87-348 (May 2, 1988), for this position. The Supreme Court's decision in *Pittston Coal Group v. Sebben*, 488 U.S. ——, 109 S. Ct. 414, 102 L. Ed. 2d 408 (1988), however, effectively overruled *Whiteman*. All parties now acknowledge that the BRB was incorrect in its reasoning on this issue, and the arguments presented in this appeal do not rely on that reasoning.

because of pneumoconiosis. Black lung benefit claims filed before July 1, 1973 were evaluated according to "interim" regulations promulgated by the former Department of Health, Education and Welfare (HEW). *See* 20 C.F.R. § 410.490. These regulations were part of Part B of the Black Lung Benefits Act to be administered by HEW. The regulations established a rebuttable presumption that a miner is totally disabled because of pneumoconiosis if certain criteria were met. *See* 20 C.F.R. § 410.490(b). The regulations also provided that the presumption of total disability could be rebutted by evidence that the miner was doing his usual coal mine work or comparable and gainful work or was able to do such work.[5] 20 C.F.R. § 410.490(c).

In 1978, Congress amended the Black Lung Benefits Act and directed the Secretary of Labor to establish permanent regulations to be applied to claimants under Part C of the Act. It also instructed the Secretary to reopen claims that had been denied prior to the effective date of the 1978 amendments. 30 U.S.C. § 945. In adjudicating these reopened claims, the criteria applied by the Department of Labor ("DOL") were to be "not more restrictive than criteria applicable to a claim filed on June 30, 1973." 30 U.S.C. § 902(f)(2). In response to this mandate, the Secretary promulgated the regulations found in 20 C.F.R. Part 727.[6] Under section 727.203, a presumption of total disability, similar to that provided for in 20 C.F.R. § 410.490, may be rebutted in any of four ways pursuant to section 727.203(b): (b)

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[5] These rebuttals are the equivalent of those found in 20 C.F.R. § 727.203(b)(1) and (b)(2).

[6] The regulations apply to claims filed after July 1, 1973, but before April 1, 1980.

(1) if the miner is still "doing his usual coal mine work or comparable and gainful work;" (b)(2) if the miner "is able to do his usual coal mine work or comparable and gainful work;" (b)(3) if the total disability of the miner "did not arise in whole or in part out of coal mine employment; or (b)(4) if the miner "does not, or did not, have pneumoconiosis." 20 C.F.R. § 727.203(b).

In *Taylor v. Clinchfield Coal Co.*, —— F.2d ——, No. 87-3852 (4th Cir. 1990), this court held that the additional means of rebuttal found under section 727.203(b), but not found in section 410.490(c), violate 30 U.S.C. § 902(f)(2).[7] *See also Dayton v. Consolidation Coal Co.*, —— F.2d ——, No. 89-3203 (4th Cir. 1990). Therefore, Robinette is entitled to have his claim evaluated under the more lenient rebuttal provisions of 20 C.F.R. Part 410.[8]

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[7] This issue had been left open in *Pittston Coal Group v. Sebben*, 488 U.S. ——, 109 S. Ct. 414, 102 L. Ed. 2d 408 (1988). In *Sebben*, the Supreme Court affirmed this court's holding in *Broyles v. Director, OWCP*, 824 F.2d 327 (4th Cir. 1987), that the invocation provisions of the DOL interim presumption at § 727.203(a) violated 30 U.S.C. § 902(f)(2) by being more restrictive than the HEW invocation provisions. The Court, however, expressly declined to consider the validity of the rebuttal provisions of the DOL interim regulations at § 727.203(b). *Sebben*, 488 U.S. at ——, 109 S. Ct. at 424, 102 L. Ed. 2d at 424.

[8] This result is also consistent with the case law of the Seventh Circuit under *Taylor v. Peabody Coal Co.*, 892 F.2d 503 (7th Cir. 1989), but contravenes *Bethenergy Mines, Inc. v. Director, OWCP*, 890 F.2d 1295 (3d Cir. 1989), and *Youghiogheny & Ohio Coal Co. v. Milliken*, 866 F.2d 195 (6th Cir. 1989). We recognize this conflict among the circuits and hope either that Congress will act to clarify these confusing regulations or that the Supreme Court will definitively resolve this conflict.

As noted above, 20 C.F.R. § 410.490(c) provides for rebuttal of the presumption of total disability only by evidence that the claimant is, in fact, doing or is able to do his usual coal mine work or comparable and gainful work. In reversing the ALJ's finding that rebuttal was established under 20 C.F.R. § 727.203(b)(2), the BRB acknowledged that Robinette was totally disabled and unable to continue his coal mining or comparable employment. Therefore, pursuant to this court's decision in *Taylor*, the Director has no other available means to rebut Robinette's presumption of disability.[9] Consequently, we find no reason to remand this case for any further consideration of the evidence.

Accordingly, the decision of the Board is reversed and we remand Robinette's claim to the Board with instructions to award benefits pursuant to 20 C.F.R. § 410.490.

REVERSED AND REMANDED WITH INSTRUCTIONS

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[9] Despite dicta in other cases that might support arguments to the contrary, the presumption invocation provision of section 410.490(b)(2), through its cross-reference to section 410.416, does not provide for rebuttal equivalent to that provided for in section 727.203(b)(3). Section 410.416 addresses the cause of the miner's *disease*, not the cause of his disability. As explained by the Supreme Court:

> [P]aragraph [410.490](b)(2) . . . provides (by cross references to §§ 410.416 and 410.456) that a presumption of disease causation is established by ten years of coal mine employment. (To be sure, §§ 410.416 and 410.456 permit rebuttal of the presumption [of disease causation], but *it is plainly not the intended purpose of paragraph (b)(2) to serve as a rebuttal provision rather than a substantive requirement.*)

Sebben, 488 U.S. at ——, 102 L. Ed. 2d at 424 (emphasis added). Therefore, the only way to rebut the presumption under § 410.490 is by evidence with respect to total disability.

APPENDIX B

Benefits Review Board
1111 20th St., N.W.
Washington, D.C. 20036

U.S. DEPARTMENT OF LABOR

BRB No. 86-215 BLA
OWCP No. 232-14-8295

JACK ROBINETTE, CLAIMANT-PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, RESPONDENT

DECISION and ORDER

[Filed Sep. 22, 1982]

Appeal of the Decision and Order of James J. Butler, Administrative Law Judge, United States Department of Labor.

Before: RAMSEY, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and MAHONY, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order (83-BLA-4939) of Administrative Law Judge James J. Butler denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* (the Act). The administrative law judge found the interim presumption invoked pursuant to 20 C.F.R. § 727.203(a)(1), but found the presumption rebutted pursuant to subsection (b)(2). The administrative law judge also found the evidence insufficient to rebut the presumption under 20 C.F.R. § 727.203(b)(1), (3), (4). On appeal, claimant contends that the administrative law judge erred by finding the evidence of record sufficient to rebut the presumption.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a); *O'Keeffe* v. *Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Subsequent to the issuance of the administrative law judge's Decision and Order, the United States

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* Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C.A. § 921(b)(5) (West 1986).

Court of Appeals for the Fourth Circuit held in *Sykes v. Director, OWCP*, 812 F.2d 890, 10 BLR 2-95, 2-98 (4th Cir. 1987), that to establish rebuttal pursuant to subsection (b)(2), the opposing party must show that the miner is not disabled "for whatever reason." A showing that the miner is not disabled for pulmonary or respiratory reasons is not sufficient to establish rebuttal under subsection (b)(2) where the record contains evidence of non-respiratory disability. The issue of causation therefore, is only relevant to subsection (b)(3). *See Sykes, supra*; *Borgeson v. Kaiser Steel Corp.*, 7 BLR 1-665 (1985). We hold that the administrative law judge's rebuttal findings under subsection (b)(2) in this claim are affirmable under subsection (b)(3), thereby rendering harmless the administrative law judge's failure to find the evidence sufficient under subsection (b)(3). *See Sykes, supra*; *Hamric v. Director, OWCP*, 6 BLR 1-1091, 1-1092 (1984). The administrative law judge acted within his discretion in crediting Dr. Nestman's assessment that claimant's pneumoconiosis is not disabling, over Dr. Thavaradhara's report as more thorough and well reasoned. *See Itell v. Ritchey Trucking Co.*, 8 BLR 1-356, 1-359 (1985); *Lipka v. Director, OWCP*, 8 BLR 1-360, 1-361 (1985); *Hall v. Director, OWCP*, 8 BLR 1-193, 1-195 (1985). Further, although the administrative law judge acted within his discretion by discrediting Dr. Thavaradhara's reports as inconsistent on their diagnoses of pneumoconiosis, the administrative law judge correctly noted that Dr. Thavaradhara's disability assessment, attributing claimant's disability to heart disease, corroborates Dr. Nestman's report. *See Itell, supra.*

Furthermore, the administrative law judge's failure to consider the only remaining disability assessments of record prepared by Drs. Fortner and Tan, which attribute claimant's disability to non-respiratory causes, also constitutes harmless error as these assessments support rebuttal under subsection (b)(3).[1] *See Sykes, supra*; *Borgeson, supra.* Moreover, inasmuch as the pulmonary function and blood gas studies of record all contain non-qualifying results, the administrative law judge properly determined that they supported a finding of rebuttal under Section 727.203(b). *See Stapleton v. Westmoreland Coal Co.*, 785 F.2d 424, 8 BLR 2-109 (4th Cir. 1986) (*en banc*); Decision and Order at 4. We therefore affirm the administrative law judge's rebuttal findings under subsection (b)(3). *See Sykes, supra*; *Stapleton, supra.*

In addition, subsequent to the issuance of the administrative law judge's Decision and Order, the United States Court of Appeals for the Fourth Circuit held in *Broyles v. Director, OWCP*, —— F.2d ——, No. 86-1091 (4th Cir. July 31, (1987) that where entitlement is precluded under Part 727, the criteria under Section 410.490 are applicable. Based

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[1] Contrary to the administrative law judge's statement that the report of Dr. Fortner only addresses heart disease, Dr. Fortner's report diagnoses "chronic obstructive pulmonary disease" and concludes that claimant's total disability is due to his heart disease. *See* Director's Exhibits 19, 52; Decision and Order at 4. Similarly, Dr. Tan's report, which the administrative law judge did not consider because he found that she did not make any disability assessments, noted that claimant could not carry or lift due to "open heart surgery" in her medical assessment. *See* Director's Exhibits 12, 20; Decision and Order at 4; *Aleshire v. Central Coal Co.*, 8 BLR 1-70 (1985); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984).

on the administrative law judge's findings that claimant has established thirty years of coal mine employment and x-ray evidence determinative of pneumoconiosis, *see* Decision and Order at 2, 3, invocation of Section 410.490 is established. *See* 20 C.F.R. § 410.490(b)(1)(i), (2). We must remand this case, however, to allow the administrative law judge to weigh all relevant evidence of record, including the reports of Drs. Fortner and Tan, to determine whether the Director, Office of Workers' Compensation Programs, has met the rebuttal burden thereunder of establishing that claimant can perform his usual coal mine employment. *See* 20 C.F.R. § 410.490 (c).

Accordingly, the Decision and Order of the administrative law judge is affirmed in part, vacated in part and remanded for further consideration in accordance with this opinion.

SO ORDERED.

/s/ Robert L. Ramsey
ROBERT L. RAMSEY, Chief
Administrative Appeals
Judge

/s/ Roy B. Smith
ROY B. SMITH
Administrative Appeals
Judge

/s/ Robert G. Mahony
ROBERT G. MAHONY
Administrative Law Judge

Dated this 22nd
day of September 1987

APPENDIX C

Benefits Review Board
1111 20th St., N.W.
Washington, D.C. 20036

U.S. DEPARTMENT OF LABOR

BRB No. 86-215 BLA
OWCP No. 232-14-8295

JACK ROBINETTE, CLAIMANT-PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, RESPONDENT

ORDER on RECONSIDERATION

[Filed Jun. 23, 1988]

By motion received October 23, 1987, the Director, Office of Workers' Compensation Programs (the Director) requested that the Board reconsider its Decision and Order affirming in part, vacating in part and remanding the Decision and Order (83-BLA-4939) of Administrative Law Judge James J. Butler denying benefits. In its Decision and Order dated September 22, 1987, the Board affirmed the administrative law judge's finding that the evidence was sufficient to rebut the interim presumption pursuant to 20 C.F.R. § 727.203(b)(3). The Board, however,

remanded the case to the administrative law judge to consider entitlement under 20 C.F.R. § 410.490 pursuant to *Broyles v. Director, OWCP*, 824 F.2d 327, 10 BLR 2-194 (4th Cir. 1987). The Director now moves for reconsideration, contending that the Board erred by applying the regulation at 20 C.F.R. § 410.490 to this claim.

Subsequent to the issuance of the Board's Decision and Order herein, the Board held in *Whiteman v. Boyle Land and Fuel Coal Co.*, —— BLR ——, BRB No. 87-348 BLA (May 2, 1988), that the regulation at 20 C.F.R. § 410.490 is invalid under the Administrative Procedure Act as it is applied to claims arising under Part C of the Act. *See* 5 U.S.C. § 533(b), (c), as incorporated into the Act by 5 U.S.C. § 554(d), 33 U.S.C. § 919(d) and 30 U.S.C. § 932(a). As claimant elected on February 10, 1978 to have his claim reviewed by the Department of Labor under the regulations at 20 C.F.R. Part 727 and Section 410.490 is therefore inapplicable to this claim, we will grant the Director's Motion for Reconsideration and affirm the administrative law judge's Decision and Order denying benefits. *Whiteman, supra*. Since we are granting the Director's Motion for Reconsideration on the foregoing basis, we need not consider the Director's alternate argument.

Accordingly, the Decision and Order of September 22, 1987 remanding this case for reconsideration under 20 C.F.R. § 410.490 is hereby modified, and the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

/s/ Robert L. Ramsey
ROBERT L. RAMSEY, Chief
Administrative Appeals
Judge

/s/ Roy P. Smith
ROY P. SMITH
Administrative Appeals
Judge

/s/ Eric Feirtag
ERIC FEIRTAG
Administrative Law Judge

Dated this 23rd day
of June 1988

APPENDIX D

Office of Administrative Law Judges
211 Main Street
San Francisco, California 94105

U.S. DEPARTMENT OF LABOR

CASE NO. 83-BLA-4939
OWCP NO. 232-14-8295

IN THE MATTER OF JACK ROBINETTE, CLAIMANT

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

[Date Issued: 24 Dec. 1985]

Sunya Anderson, Esq., For the Claimant

Mark R. Malecki, Esq., For the Director

BEFORE: JAMES J. BUTLER, Administrative Law Judge

DECISION AND ORDER—DENYING BENEFITS

This is a claim for benefits filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1972 and the Black Lung Benefits Reform Act of 1977, 30 U.S.C. § 901 *et seq.*, (hereinafter the "Act"). In accordance with the Act and the related regulations, contained in Title 20,

Code of Federal Regulations,[1] a formal hearing was held in Charleston, West Virginia on July 10, 1985. At this hearing the record was left open so that the medical report of Dr. Pathom Thavaradhara could be submitted post-hearing. This report has been submitted and it is admitted as Director's Exhibit 52. The record is now closed.

Issue

The only issue presented for decision is whether the claimant is totally disabled.

General Background

The claimant, Jack Robinette, was born on June 13, 1928. (DX-1). He began working in coal mine employment in 1945 (T-24) and he retired from coal mine employment in 1979. (T-10). During this time he was employed as a continuous miner operator and as a timberman. (T-10). He was constantly exposed to coal dust. (T-10).

The claimant is married to Betty Robinette. (DX-1). At the time this claim was filed, he had one dependent child, Gregory J. Robinette, born February 26, 1959 (DX-1). This claim was filed on March 26, 1973. (DX-1). Claimant elected to have his claim reviewed under the Part 727 regulations on February 10, 1978. (DX-34).

The Interim Presumption

The Act provides benefits to persons who are totally disabled due to pneumoconiosis. Pneumoconi-

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[1] Cited provisions herein refer to sections of that Title. Also, the following abbreviations are used: Director's and Claimant's Exhibits—DX and CX, respectively; Transcript of the Hearing—T.

osis is defined by the Act and the regulations to mean a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments arising out of coal mine employment. Section 727.203 (a) of the regulations establishes a rebuttable ("interim") presumption, where the miner has engaged in coal mine employment for at least ten years, that the miner is totally disabled due to pneumoconiosis arising from his coal mine employment if he meets any one of the criteria set forth in subsections (a)(1) through (a)(4) of that section. Since claimant worked as a miner for thirty years, he will be eligible for the presumption if he meets the appropriate criteria. (T-4).

The presumption is raised where x-ray evidence establishes the existence of pneumoconiosis. See § 727.203(a)(1) and § 410.428. The following x-ray interpretations have been submitted into evidence:

Date	Exhibit	Rereading	Physician	Conclusion
6/20/80	DX-44		Tanguilg	Positive
4/27/81	DX-39		Craft	Positive
2/25/79	DX-32	10/19/79	Dessen	Positive
3/30/80	DX-31		Al-Asbahi	Positive
3/7/80	DX-30		Subramaniam	Positive
3/5/80	DX-29		Subramaniam	Positive
3/4/79	DX-28		Subramaniam	Positive
10/29/79	DX-27		Al-Asbahi	Positive
2/25/79	DX-26		Subramaniam	Positive
10/18/78	DX-25		Subramaniam	Positive
8/10/73	DX-24		Pelaez	Positive
4/26/73	DX-23		Pelaez	Positive
9/5/69	DX-22		Godwin	Positive
4/26/73	DX-21		Furnary	Unreadable
9/21/79	DX-18		Khan	Positive
5/29/85	DX-52		Al-Asbahi	Positive

With the exception of one reading by Dr. Furnary, all of the x-ray readings are positive for pneumoconiosis. The evidence presented, therefore, is clearly

sufficient to raise the presumption pursuant to § 727.203(a)(1).

Ventilatory Studies

The presumption will also be raised if ventilatory studies establish the existence of a chronic respiratory or pulmonary disease [§ 727.203(a)(2)]. In order to be considered, these studies must be both "qualifying" and "conforming." A qualifying study is a study which produces forced expiratory volume in one second (FEV_1) and maximum voluntary ventilation (MVV) values which are equal to or less than the values set out in 20 C.F.R. § 727.203(a)(2). In order to be considered conforming, the study must meet the quality standards set out in 20 C.F.R. § 410.430.

There were three ventilatory studies performed and submitted. The results of these studies were reported as follows:

Date	Exhibit	Physician	Height	FEV_1	MVV
2/19/80	DX-12	Tan	67"	2.31	112
6/20/80	DX-44	Nestmann	67"	3.08	133
5/29/85	DX-52	Thavaradhara	67"	2.35	90.56

None of these studies produced qualifying results. The evidence submitted, therefore, is clearly insufficient to raise the presumption pursuant to § 727.203(a)(2).

Blood Gas Studies

The presumption may also be raised by blood gas studies which demonstrate an impairment in the transfer of oxygen from the lung alveoli to the blood as indicated by values equal to or below those set out in the chart in 20 C.F.R. § 727.203(a)(3). There are three blood gas studies submitted which had non-

qualifying results. These studies, therefore, are clearly insufficient to raise the presumption pursuant to § 727.203(a)(3). The results of the studies were reported as follows:

Date	Exhibit	Physician	PCO_2	PO_2
2/19/80	DX-13	Tan	32	137
6/20/80	DX-44	Nestmann	37	90
5/29/85	DX-52	Thavaradhara	38	87

Other Medical Evidence

The presumption may also be raised under 20 C.F.R. § 727.203(a)(4) on the basis of other medical evidence including the documented opinion of a physician, exercising reasoned medical judgment, which demonstrates the existence of a totally disabling respiratory or pulmonary impairment. In this case, no other evidence has been submitted which would be sufficient [to] raise the presumption. None of the physicians who examined the claimant found him to be totally disabled.

Conclusion

Since the claimant has submitted sufficient evidence to satisfy § 727.203(a)(1), the presumption is raised in his favor.

Rebuttal of the Interim Presumption

The presumption of total disability established under § 727.203(a) may be rebutted pursuant to § 727.203(b) if the evidence submitted is sufficient to satisfy the criteria established by § 727.203(b).

The first factor to be considered is whether the evidence establishes that the claimant is, in fact, doing his usual coal mine work or comparable and gainful work [§ 727.203(b)(1)]. Since the record

clearly shows that the claimant stopped working in 1979 and that he has not returned to work since that time, the evidence introduced is insufficient to rebut the presumption pursuant to § 727.203(b)(1). (T-10).

The second factor which must be considered is whether the evidence establishes that the claimant is able to do his usual coal mine work or comparable and gainful work [§ 727.203(b)(2)].

In the case at hand, the evidence submitted is clearly sufficient to rebut the presumption. As previously noted, all of the ventilatory studies and blood gas studies were non-qualifying. Also, the only two physicians who rendered an opinion on the issue of disability found that the claimant was not totally disabled. The claimant was examined by five physicians. Dr. Fortner and Dr. Stratford G. Warren examined the claimant in connection with his heart disease and coronary bypass surgery. (DX-18, 19). Neither of these physicians rendered an opinion as to whether the claimant was disabled due to a respiratory or pulmonary impairment.

Similarly, Dr. Tan examined the claimant on February 19, 1980 and diagnosed the existence of pneumoconiosis; however, she did not make any findings concerning disability. (DX-20).

The only physicians who specifically assessed the extent of the claimant's disability were Dr. Ralph H. Nestmann (DX-44) and Dr. Patham Thavaradhara. (DX-52). Dr. Nestmann examined the claimant on June 20, 1980. After performing a non-qualifying ventilatory study and a non-qualifying blood gas study and an x-ray which he found showed only minimal pneumoconiosis and a physical examination, Dr. Nestmann concluded that the claimant did have pneumoconiosis, but that this pneumoconiosis would

not prevent the miner from performing his usual coal mine work. Dr. Nestman's opinion was based upon all of the evidence he examined and not primarily or principally upon non-qualifying ventilatory or blood gas tests.

Dr. Pathom Thavaradhara examined the claimant on May 29, 1985 and on September 14, 1983. (DX-52). In an initial opinion dated September 14, 1983, Dr. Thavaradhara found that the claimant did have pneumoconiosis on the basis of a chest x-ray. He stated, however, that the claimant's ventilatory testing was normal.

In an opinion dated June 18, 1985 and an addendum dated August 12, 1985, Dr. Thavaradhara concluded that the claimant was not disabled due to lung disease. At this time he stated that the claimant did not have pneumoconiosis and that any disability he might have would be related to heart disease. (DX-52). Dr. Thavaradhara based his opinion on an x-ray reading, a ventilatory study, a blood gas study and a physical examination. His opinion is clearly inconsistent concerning the existence of pneumoconiosis. Due to the inconsistency in his opinion, it will not be accorded great weight. It does tend, however, to corroborate Dr. Nestmann's findings.

On the whole, the evidence submitted is sufficient to rebut the presumption pursuant to § 727.203 (b)(2). *See Blankenship v. Beatrice Pocahontas Coal Company*, 678 F.2d 506 (4th Cir. 1982).

The third factor which must be considered is whether the evidence establishes that the claimant's disability did not arise out of coal mine employment. § 727.203(b)(3). The only physician who attributed the claimant's symptoms to heart disease was Dr. Thavaradhara (DX-52). Dr. Thavaradhara's findings, however, were far from conclusive. In the ad-

dendum dated August 12, 1985, Dr. Thavaradhara stated that he would need "advice" from the claimant's heart physician before he would reach the conclusion that the claimant's disability was due to heart disease alone. His opinion, therefore, will be accorded little weight due to it tentative nature. The remaining evidence clearly indicates that the claimant has a heart condition, but no other physician has stated that the claimant's disability is due to heart disease rather than lung disease. The evidence submitted, therefore, is insufficient to rebut the presumption pursuant to § 727.203(b)(3).

The last factor to consider is whether the evidence is sufficient to demonstrate that the claimant does not have pneumoconiosis. § 727.203(b)(4). In this case, however, all of the x-ray evidence is positive and the majority of the physicians expressing a full opinion on the issue have determined that the claimant does have pneumoconiosis. It is determined, therefore, that the evidence submitted is insufficient to rebut the presumption pursuant to § 727.203(b)(4). Conclusion: The presumption is rebutted pursuant to § 727.203(b)(2).

Since the claim cannot be granted pursuant to § 727.203(a), it must be considered under Subpart D of Part 410 of the regulations. *See* § 727.203(d) and *Muncy v. Wolfe Creek Collieries Coal Co.*, 3 BLR 1-627 (1981). The criteria for determining the existence of pneumoconiosis, including the statutory presumption, are set out in § 410.414. The evidence introduced by the claimant is insufficient to satisfy these criteria for the following reasons. As has been previously stated, the x-ray evidence is sufficient to establish the existence of pneumoconiosis [§ 410.414(a)]; however, the remaining evidence fails to estab-

lish total disability due to pneumoconiosis for the reasons outlined above.

ORDER

Finding that claimant's pneumoconiosis is not totally disabling, the claim for benefits under the Act is denied.

/s/ James J. Butler
JAMES J. BUTLER
Administrative Law Judge

San Francisco, California
JJB:mw

NOTICE OF APPEAL RIGHTS. Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date of this decision, by filing a notice of appeal with the Benefits Review Board, 1111 20th Street, Suite 757, Washington, D.C. 20036.

APPENDIX E

A. The Fifth Amendment of the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces or in the Militia when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

B. Section 402(f) of the Black Lung Benefits Act, 30 U.S.C. 902(f), provides, in relevant part:

> (1) The term "total disability" has the meaning given it by regulations of the Secretary of Health and Human Services for claims under part B of this subchapter, and by regulations of the Secretary of Labor for claims under part C of this subchapter, subject to the relevant provisions of subsections (b) and (d) of section 923 of this title, except that—
>
> * * * * *
>
> (2) Criteria applied by the Secretary of Labor in the case of—
>
> > (A) any claim which is subject to review by the Secretary of Health and Human Services, or subject to a determination by

the Secretary of Labor, under section 945 (a) of this title;

(B) any claim which is subject to review by the Secretary of Labor under section 945 (b) of this title; and

(C) any claim filed on or before the effective date of regulations promulgated under this subsection by the Secretary of Labor;

shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973, whether or not the final disposition of any such claim occurs after the date of such promulgation of regulations by the Secretary of Labor.

C. HEW's interim regulation, 20 C.F.R. 410.490, provides:

Interim adjudicatory rules for certain Part B claims filed by a miner before July 1, 1973, or by a survivor where the miner died before January 1, 1974.

(a) *Basis for rules.* In enacting the Black Lung Act of 1972, the Congress noted that adjudication of the large backlog of claims generated by the earlier law could not await the establishment of facilities and development of medical tests not presently available to evaluate disability due to pneumoconiosis, and that such claims must be handled under present circumstances in light of limited medical resources and techniques. Accordingly, the Congress stated its expectancy that the Secretary would adopt such interim evidentiary rules and disability evaluation criteria as would permit prompt and vigorous processing of the large backlog of claims

consistent with the language and intent of the 1972 amendments and that such rules and criteria would give full consideration to the combined employment handicap of disease and age and provide for the adjudication of claims on the basis of medical evidence other than physical performance tests when it is not feasible to provide such tests. The provisions of this section establish such interim evidentiary rules and criteria. They take full account of the congressional expectation that in many instances it is not feasible to require extensive pulmonary function testing to measure the total extent of an individual's breathing impairment, and that an impairment in the transfer of oxygen from the lung alveoli to cellular level can exist in an individual even though his chest roentgenogram (X-ray) or ventilatory function tests are normal.

(b) *Interim presumption.* With respect to a miner who files a claim for benefits before July 1, 1973, and with respect to a survivor of a miner who dies before January 1, 1974, when such survivor timely files a claim for benefits, such miner will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of death, or his death will be presumed to be due to pneumoconiosis, as the case may be, if:

(1) One of the following medical requirements is met:

(i) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see § 410.428); or

(ii) In the case of a miner employed for at least 15 years in underground or comparable

coal mine employment, ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in § 410.412(a)(2)) as demonstrated by values which are equal to or less than the values specified in the following table:

	Equal to or less than—	
	FEV_1	MVV
67″ or less	2.3	92
68″	2.4	96
69″	2.4	96
70″	2.5	100
71″	2.6	104
72″	2.6	104
73″ or more	2.7	108

(2) The impairment established in accordance with paragraph (b)(1) of this section arose out of coal mine employment (see §§ 410.416 and 410.456).

(3) With respect to a miner who meets the medical requirements in paragraph (b)(1)(ii) of this section, he will be presumed to be totally disabled due to pneumoconiosis arising out of coal mine employment, or to have been totally disabled at the time of his death due to pneumoconiosis arising out such employment, or his death will be presumed to be due to pneumoconiosis arising out of such employment, as the case may be, if he has at least 10 years of the requisite coal mine employment.

(c) *Rebuttal of presumption.* The presumption in paragraph (b) of this section may be rebutted if:

(1) There is evidence that the individual is, in fact, doing his usual coal mine work or com-

parable and gainful work (see § 410.412(a)(1)), or

(2) Other evidence, including physical performance tests (where such tests are available and their administration is not contraindicated), establish that the individual is able to do his usual coal mine work or comparable and gainful work (see § 410.412(a)(1)).

(d) *Application of presumption on readjudication.* Any claim initially adjudicated under the rules in this section will, if the claim is for any reason thereafter readjudicated, be readjudicated under the same rules.

(e) *Failure of miner to qualify under presumption in paragraph (b) of this section.* Where it is not established on the basis of the presumption in paragraph (b) of this section that a miner is (or was) totally disabled due to pneumoconiosis, or was totally disabled due to pneumoconiosis at the time of his death, or that his death was due to pneumoconiosis, the claimant may nevertheless establish the requisite disability or cause of death of the miner under the rules set out in §§ 410.412 to 410.462.

D. Labor's interim regulation, 20 C.F.R. 727.203, provides:

Interim presumption.

(a) *Establishing interim presumption.* A miner who engaged in coal mine employment for at least 10 years will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of death, or death will be presumed to be due to pneumoconiosis, arising out of that em-

ployment, if one of the following medical requirements is met:

(1) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see § 410.428 of this title);

(2) Ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in § 410.412(a)(2) of this title) as demonstrated by values which are equal to or less than the values specified in the following table:

	Equal to or less than—	
	FEV_1	MVV
67″ or less	2.3	92
68″	2.4	96
69″	2.4	96
70″	2.5	100
71″	2.6	104
72″	2.6	104
73″ or more	2.7	108

(3) Blood gas studies which demonstrate the presence of an impairment in the transfer of oxygen from the lung alveoli to the blood as indicated by values which are equal to or less than the values specified in the following table:

Arterial pO_2	Arterial pCO_2 equal to or less than (mm. Hg.)
30 or below	70.
31	69.
32	68.
33	67.
34	66.
35	65.
36	64.
37	63.
38	62.
39	61.
40-45	60
Above 45	Any values.

(4) Other medical evidence, including the documented opinion of a physician exercising reasoned medical judgment, establishes the presence of a totally disabling respiratory or pulmonary impairment;

(5) In the case of a deceased miner where no medical evidence is available, the affidavit of the survivor of such miner or other persons with knowledge of the miner's physical condition, demonstrates the presence of a totally disabling respiratory or pulmonary impairment.

(b) *Rebuttal of interim presumption.* In adjudicating a claim under this subpart, all relevant medical evidence shall be considered. The presumption in paragraph (a) of this section shall be rebutted if:

(1) The evidence establishes that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or

(2) In light of all relevant evidence it is established that the individual is able to do his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or

(3) The evidence establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment; or

(4) The evidence establishes that the miner does not, or did not, have pneumoconiosis.

(c) *Applicability of Part 718.* Except as is otherwise provided in this section, the provisions of Part 718 of this subchapter as amended from time to time, shall also be applicable to the adjudication of claims under this section.

(d) *Failure of miner to qualify under the presumption in paragraph (a) of this section.* Where eligibility is not established under this section, such eligibility may be established under Part 718 of this subchapter as amended from time to time.

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